

FILE COPY

|                           |
|---------------------------|
| Office Supreme Court U.S. |
| FILED                     |
| JAN 2 1959                |
| JAMES R. BROWNING, Clerk  |

**In the**  
**Supreme Court of the United States**

OCTOBER TERM, 1958

NO. [REDACTED] 27

The State of South Dakota and the Public Utilities  
Commission of the State of South Dakota,

*Appellants,*

vs.

United States of America and Interstate Commerce  
Commission, et al.;

*Appellees.*

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA

*JURISDICTIONAL STATEMENT*

Phil Saunders

Attorney General

Ernest W. Stephens

365 Pierre St., Pierre, S. D.

Herman L. Bode

Assistant Attorney General

Capitol Building

Pierre, South Dakota

ATTORNEYS FOR APPELLANTS

## INDEX

|  | Page |
|--|------|
| The questions presented                              | 2    |
| Statement of the case                                | 3    |
| The questions are substantial                        | 5    |
| 1. The disregard of the branch lines in South Dakota | 6    |
| 2. The antitrust effect                              | 9    |
| Conclusion   | 11   |

## AUTHORITIES CITED

### Cases:

|   |    |
|---|----|
| McLean Trucking Co. v. United States,<br>321 U.S. 67 (1944)               | 10 |
| New York Central Securities Corp. v. United States,<br>287 U.S. 12 (1932) | 6  |

### Statutes:

#### Administrative Procedure Act:

|                                   |     |
|-----------------------------------|-----|
| Section 8 (5 U.S.C. Section 1007) | 3-9 |
|-----------------------------------|-----|

#### Clayton Act:

|                                  |   |
|----------------------------------|---|
| Section 7 (16 U.S.C. Section 18) | 3 |
|----------------------------------|---|

#### Interstate Commerce Act:

|   |    |
|---|----|
| National Transportation Policy (49 U.S.C. preceding<br>Section 1) | 6  |
| Section 5(2) (49 U.S.C. Section 5(2))                             | 6  |
| Section 5(11) (49 U.S.C. Section 5(11))                           | 10 |

#### Sherman Act:

|                                 |   |
|---------------------------------|---|
| Section 1 (15 U.S.C. Section 1) | 3 |
|---------------------------------|---|

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1958

NO. \_\_\_\_\_

The State of South Dakota and the Public Utilities  
Commission of the State of South Dakota,

*Appellants,*

vs.

United States of America and Interstate Commerce  
Commission, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA

**JURISDICTIONAL STATEMENT**

This appeal is taken from the final order of the United States District Court for the District of Minnesota, entered September 16, 1958, dismissing several complaints, including the complaint of these appellants as intervening plaintiffs below, and refusing to vacate an order of Division 4 of the Interstate Commerce Commission issued May 31, 1957, and an order of the Interstate Commerce Commission issued October 30, 1957. The Commission orders authorized The

Atchison, Topeka and Santa Fe Railway Company, the Pennsylvania Company and The Pennsylvania Railroad Company to acquire control, through stock ownership, of the Toledo, Peoria & Western Railroad Company, and dismissed the competing application for acquisition by The Minneapolis & St. Louis Railway Company.

Minneapolis has taken an earlier appeal from the same final order of the District Court, and has already served and filed its Jurisdictional Statement. That appeal bears Docket No. 552. In order to avoid burdening the Supreme Court, the present appellants will rely upon the statement of the Opinions Below, the Jurisdiction and the Statutes Involved contained in the Minneapolis Jurisdictional Statement, and the copies of the opinions and statutes set forth as appendices to that Jurisdictional Statement.

### THE QUESTIONS PRESENTED

The Notice of Appeal filed by the present appellants presented five questions, which are substantially similar to those set forth in the Jurisdictional Statement of Minneapolis. All five questions are believed to present substantial and important issues requiring full hearing and consideration by this Court. For present purposes, however, it is desired to present only two questions which are of immediate and urgent concern to these appellants.

1. The Interstate Commerce Commission acted arbitrarily, capriciously and erroneously in disregard-

Hereafter, as in the proceedings below, The Minneapolis & St. Louis Railway Company will be referred to as "Minneapolis", the Toledo, Peoria & Western Railroad Company as "Western", and The Atchison, Topeka and Santa Fe Railway Company as "Santa Fe".

ing the effect which the Pennsylvania-Santa Fe acquisition would have in causing curtailment and termination of service on the branch lines of Minneapolis in South Dakota. The Commission's decision ignoring that effect is not based on findings supported by substantial evidence, as required by section 8 of the Administrative Procedure Act, 5 U.S.C. § 1007, and has no rational basis.

2. In authorizing the Pennsylvania-Santa Fe acquisition, the Interstate Commerce Commission failed to give proper weight and consideration to the adverse competitive effect thereof on Minneapolis and to the antitrust policy and purposes of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 7 of the Clayton Act, 15 U.S.C. § 18.

### STATEMENT OF THE CASE

The background of this case and the prior proceedings are sufficiently described in the Statement of the Case of Minneapolis.

The State of South Dakota and the Public Utilities Commission of the State of South Dakota have participated throughout, both before the Interstate Commerce Commission and in the District Court. These appellants have done so in order to protect the public interest of South Dakota in adequate rail transportation and to assure the integrity of the marginal branch lines of Minneapolis serving South Dakota and the several railroad stations located along such lines. Absence of competitive rail lines serving much of the area renders imperative continuance of the established rail service by Minneapolis.

The Minneapolis branch line entering South Dakota extends approximately 154 miles into the north-eastern part of the state. It is an important link of rail transportation in the state, serving six counties and fifteen cities and towns and the trade territory adjacent thereto. This area in South Dakota consists of 6,685 square miles of farm land, all under cultivation, with an annual average production of over \$92,000,000 of agricultural commodities. Over a period of 27 years, an average of 136,581 tons of traffic originated on the South Dakota segment of Minneapolis and 92,363 tons of freight terminated thereon. That segment of rail transportation is a part of the less remunerative mileage operated by Minneapolis. Continuance of rail service on this segment is dependent upon the results of operations over the system as a whole.

Witness Swanson testified (Tr. 1,183):

"We have analyzed this traffic and have come to the conclusion that based upon 1954 figures we would suffer an annual loss of approximately \$1,110,000 in the event the application of the Pennsylvania and Santa Fe were granted.

"All of this business I have described as being vulnerable to loss to the M & St. L. is very desirable traffic. It not only pays its way but lends substantial support to our entire system. *Without it our low density lines in South Dakota, Western Minnesota, and Western Iowa could not survive.*" (emphasis supplied)

The factual accounting basis for Mr. Swanson's estimate was in evidence and was not challenged. His testimony was corroborated by that of other witnesses, including Dr. Edmund A. Nightingale, of the University of Minnesota, an independent, unquestioned au-

thority on transportation and railroad traffic. None of the testimony was controverted.

The Interstate Commerce Commission had only this to say:

*State representations* — The States of Minnesota and South Dakota, along with their respective Public Service Commissions, intervened in support of the Minneapolis application. They fear that with Western under the control of the Santa Fe and the Pennsylvania, the Peoria route of the Minneapolis will deteriorate to the extent that its low density lines in Minnesota and South Dakota will be in danger of abandonment. \* \* \* Of course, there can be no abandonment of any line of railroad without the issuance by us of a certificate of public convenience and necessity permitting such abandonment. So far as the instant record is concerned, no abandonments are presently contemplated." (Appendix B to Minneapolis Jurisdictional Statement, p. 86)

The District Court did even less. It did not even refer to the contentions of these appellants except to state that they supported the Minneapolis.

The Notice of Appeal of the present appellants was filed November 12, 1958.

### THE QUESTIONS ARE SUBSTANTIAL

The two questions dealt with herein are, to a substantial extent, interrelated and dependent. In essence, the Interstate Commerce Commission both ignored the factors which are of primary importance to these appellants and should be controlling, and applied wholly different standards in testing the results of the separate competing applications. The District Court, in turn, simply bypassed the Commission's

errors of omission and commission and failed to perform, in any sense, its duty of judicial review.

1. *The Disregard of the Branch Lines in South Dakota.*

The National Transportation Policy (49 U.S.C. preceding § 1) requires the Interstate Commerce Commission "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation." Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) commands the Commission to approve applications for control of a carrier only when the proposed transaction "will be consistent with the public interest", and orders the Commission to give weight to the effect of the proposed transaction upon adequate transportation service to the public. The meaning of the basic statutory criterion has been expressed as follows by Chief Justice Hughes in *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25 (1932):

"\* \* \* the term 'public interest' \* \* \* is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. \* \* \*"

In the instant case the evidence before the Commission established beyond question that the Minneapolis is solely dependent upon the Peoria gateway for its life blood, whereas the Pennsylvania-Santa Fe combine has no comparable interest in the Peoria gateway; that ownership of Western by the Minneapolis would foster economy and efficiency, whereas ownership by the Pennsylvania-Santa Fe combine would promote neither economy nor efficiency; that



ownership by the Minneapolis would promote adequate transportation service, whereas ownership by the Pennsylvania-Santa Fe combine would do nothing toward that end. The State of South Dakota has a vital interest in strengthening the Minneapolis to preserve the adequacy of its transportation service on the branch lines in this state. The appellants have an equally vital interest in seeing that the Minneapolis is not weakened, because the inevitable result of any such weakening will be felt first on the marginal branch lines in South Dakota.

The record is replete with uncontroverted evidence of the vulnerability of the traffic presently carried by Minneapolis. Much of that highly competitive traffic is certain to be diverted by the powerful solicitation efforts of the Pennsylvania-Santa Fe combine. The Commission recognized that there might be some diversion of traffic, but concluded, " \* \* \* such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers." (Appendix B to Minneapolis Jurisdictional Statement, p. 76). That conclusion is empty, unexplained, unsupported and erroneous.

As indicated above, the Commission also brushed off the contentions of these appellants by stating that, "no abandonments are presently contemplated." It is clear, however, that one of the first effects of drying up the Minneapolis traffic will be an application, at some future date, for abandonment of service on the marginal branch lines in South Dakota. These appellants are interested in preventive medicine now, not curative medicine in the future. A diminution of the Minneapolis revenues must be prevented now so

that no reason can be given in the future for abandonment of the trackage in South Dakota. If the revenues are allowed to diminish and in consequence the branch lines in South Dakota become a burden on interstate commerce, it will then be the duty of the Commission to authorize the abandonment of those lines. That result was totally disregarded by the Commission in the instant case.

The Commission's shocking pre-judgment of this case is laid bare by the double standard it employed. The effect of the Pennsylvania-Santa Fe acquisition of the Minneapolis was simply brushed aside and the future abandonments it would necessitate were deemed unimportant. On the other hand, when considering the effect of an acquisition of Western by the Minneapolis, the Commission state:

"Under the Minneapolis' unified-operation theory a new service route via Forrest would be established for such traffic which would imperil, or at least diminish, the Wabash's participation therein, and possibly could result in the abandonment of the latter's Des Moines branch." (Appendix B to Minneapolis Jurisdictional Statement, p. 73)

The Wabash, of course, is a large railroad and a subsidiary of the giant Pennsylvania. The record contains no support for the Commission's solicitude on its behalf. The contrast between the treatment accorded the competing proposals make a travesty of administrative justice.

A number of communities along the Western supported the Pennsylvania-Santa Fe application. Their intervention, however, was merely a result of a brief, intensive public relations campaign by the wealthy

Santa Fe. In truth those communities would benefit from a Minneapolis acquisition and probably would suffer from a Pennsylvania-Santa-Fe acquisition. Certain labor groups also supported the Pennsylvania-Santa Fe application. They also could not suffer from a Minneapolis acquisition: they are protected by the Minneapolis' commitment to abide by the provisions of the Washington Job Protection Agreement of 1936. Furthermore, the record is clear that any labor economies would come as the result of normal retirements, not discharges.

In reaching its arbitrary conclusion to approve the further aggrandizement of the two railroad giants and to overlook the harmful effects on these appellants and others, the Commission not only ignored the controlling statutory criteria but also violated the procedural requirements. It did not, because it could not, make the findings required by section 8 of the Administrative Procedure Act (5 U.S.C. § 1007). Absent such findings, there was no basis on which the District Court could perform its duty of judicial review. These appellants were denied fair treatment by the Commission. They were then deprived of judicial review by the District Court. Their only hope for any consideration in this uneven struggle lies in full review on the merits by the Supreme Court.

## *2. The Antitrust Effect.*

The Interstate Commerce Commission and the district Court sanctioned and approved what is in effect a gigantic railroad merger. The acquisition of Western gives the Pennsylvania-Santa Fe combine a third major gateway and unifies their operations from Tidewater on the east to Tidewater on the west.

In *McLean Trucking Co. v. United States*, 321 U.S. 67, 86 (1944), this Court announced:

"Congress, however, neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission, in passing on a proposed merger, to ignore their policy."

Admittedly section 5(11) of the Interstate Commerce Act (49 U.S.C. § 5(11)) empowers the Commission in an appropriate case to give immunity from prosecution under the antitrust laws. That immunity, if it is to be granted, must be based on an explicit judgment that it is required by other factors in the "public interest". The size of the merging carriers cannot be wholly ignored as it was in the instant case. The powerful combine authorized by the Commission in this case dwarfs, by comparison, the few motor lines whose merger was authorized in the *McLean* case.

The Pennsylvania-Santa Fe combine is a gigantic one, by any test. Its latent power is an enormous threat to any smaller competitors and to intervenors, like these appellants, who are dependent upon such smaller competitors. The monopoly or oligopoly sanctioned in this case has no precedent. There are no findings and there is no articulation of any reasons which could justify the creation of this colossus. If this Court affirms that result or declines to review it, it will be holding that the antitrust laws are wholly inapplicable to the transportation industry. It will also be making a mockery of the standards of the Interstate Commerce Act and the requirement for adequate transportation service.

## CONCLUSION

The Interstate Commerce Commission failed to perform its statutory duty. Its arbitrary conclusions have neither a rational basis nor supporting findings. It is respectfully submitted that the instant appeal presents substantial questions of public importance and should be heard on the merits.

Respectfully submitted,

Phil Saunders  
Attorney General

Ernest W. Stephens  
365 Pierre St, Pierre, S. D.

Herman L. Bode  
Assistant Attorney General

Pierre, South Dakota  
Capitol Building

ATTORNEYS FOR APPELLANTS

RISDIE

7172

10 AAL

11 EAL

FILE COPY

|                          |
|--------------------------|
| U.S. Supreme Court, U.S. |
| FILED                    |
| JAN 13 1959              |
| JAMES W. BOWLING, Clerk  |

**In the  
Supreme Court of the United States  
OCTOBER TERM 1958**

|  |
|--|
| <div data-bbox="401 465 536 518" style="background-color: black; width: 123px; height: 30px;"></div> <div data-bbox="550 465 623 509" style="font-size: 24px; margin-left: 10px;">28</div> |
|--|

I-  
S  
E  
S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

**JURISDICTIONAL STATEMENT**

✓ **MILES LORD**  
Attorney General of the State of Minnesota ✓  
✓ **HAROLD J. SODERBERG**  
Assistant Attorney General ✓  
102 State Capitol  
Saint Paul, Minnesota



Statutes:

|  |   |
|--|---|
| 28 U. S. C., Sec. 1336.....                      | 3 |
| 28 U. S. C., Sec. 2284 and Secs. 2321-2325 ..... | 3 |
| 28 U. S. C., Secs. 1253 and 2101(b) .....        | 3 |

Clayton Act:

|   |   |
|---|---|
| Section 7 (15 U. S. C., Sec. 18) .....  | 3 |
| Section 10 (15 U. S. C., Sec. 20) ..... | 3 |

Interstate Commerce Act:

|   |      |
|---|------|
| National Transportation Policy .....          | 3, 8 |
| Section 5(11) (49 U. S. C., Sec. 5(11)) ..... | 3    |
| Section 5(2) (49 U. S. C., Sec. 5(2)) .....   | 3, 8 |

Sherman Act:

|                                       |   |
|---------------------------------------|---|
| Section 1 (15 U. S. C., Sec. 1) ..... | 3 |
|---------------------------------------|---|

**In the  
Supreme Court of the United States**

**OCTOBER TERM 1958**

|  |
|--|
| NO. 1033   |
| THE STATE OF MINNESOTA and the<br>MINNESOTA RAILROAD AND WAREHOUSE<br>COMMISSION,<br>Appellants,<br>vs.<br>THE STATE OF ARIZONA and<br>THE INTERSTATE COMMERCE COMMISSION,<br>Appellees. |

Appellants  
Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

**JURISDICTIONAL STATEMENT**

The State of Minnesota and the Minnesota Railroad and Warehouse Commission (hereinafter together referred to as the State of Minnesota) join with the Minneapolis and St. Louis Railway Company (hereinafter referred to as appellant or Minneapolis) in appealing from the final order of the United States District Court for the District of Minnesota, entered September 16, 1958, dismissing the appellant's complaint and the complaint in intervention of the State of Minnesota and refusing to set aside an order of Division 4 of the Interstate Commerce Commission issued May 31, 1957, and an order of the Interstate Commerce

Commission issued October 30, 1957. Those orders, in substance, granted the application of The Atchison, Topeka and Santa Fe Railway Company, the Pennsylvania Company and the Pennsylvania Railroad Company to purchase the stock of, and acquire control of, the Toledo, Peoria & Western Railroad Company, and dismissed the competing application of the appellant.<sup>1</sup> This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

### OPINIONS BELOW

The opinion of the District Court for the District of Minnesota, 4th Division, is reported in 165 F. Supp. 893. A copy of that opinion is attached as Appendix A to the Minneapolis jurisdictional statement, Docket No. 552, and is incorporated herein by reference. The report of Division 4 of the Interstate Commerce Commission is reported in 295 I. C. C. 523. Copies of that report and of the orders of Division 4 and of the full Commission are attached to the Minneapolis jurisdictional statement as Appendix B and are incorporated herein by reference.

<sup>1</sup> The interested railroads will be referred to hereinafter as follows:

|   |                       |
|---|-----------------------|
| Minneapolis and St. Louis Railway Company       | Minneapolis           |
| Toledo, Peoria & Western Railroad Company       | Western               |
| The Pennsylvania Railroad Company               | Pennsylvania Railroad |
| The Atchison, Topeka & Santa Fe Railway Company | Santa Fe              |
| Chicago, Burlington & Quincy Railroad Company   | Burlington            |
| Wabash Railroad Company                         | Wabash                |
| The Monon Railroad                              | Monon                 |
| New York, Chicago & St. Louis Railroad Company  | Nickel Plate          |
| Chicago, Rock Island & Pacific Railroad Company | Rock Island           |

## **JURISDICTION**

This action was brought under 28 U. S. C., §1336, to set aside the above-mentioned orders of Division 4 of the Interstate Commerce Commission and of the Interstate Commerce Commission. It was heard by a District Court of three judges, as provided in 28 U. S. C., §2284 and §§2321-2325. The final order of the District Court was entered September 16, 1958, and the Notice of Appeal of the present appellant was filed in that court November 10, 1958. The jurisdiction of the Supreme Court to review that decision by direct appeal is conferred by 28 U. S. C., §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review that decision on direct appeal in this case: *Chicago, M., St. P. & P. R. R. Co. v. Illinois*, 355 U. S. 300 (1958); *Allegheny Corp. v. Breswick & Co.*, 353 U. S. 151 (1957); *United States v. I. C. C.*, 352 U. S. 158 (1956); *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946).

## **STATUTES INVOLVED**

Section 1 of the Sherman Act, as amended (15 U. S. C., §1), sections 7 and 10 of the Clayton Act, as amended (15 U. S. C., §§18 and 20), and the National Transportation Policy and sections 5(2) and 5(11) of the Interstate Commerce Act, as amended (49 U. S. C. preceding §1, and §§5(2) and 5(11)) are set forth in Appendix C to the Minneapolis jurisdictional statement and are incorporated herein by reference.

## **THE QUESTIONS PRESENTED**

The statement under this heading in the Minneapolis jurisdictional statement is incorporated herein by reference.

## STATEMENT OF THE CASE

The statement under this heading in the Minneapolis jurisdictional statement is incorporated herein by reference.

In addition, the State of Minnesota wishes particularly to advise the court of the reasons for its participation throughout this proceeding and the background of its position. The interest of the State stems from its duty to assure the adequacy of service by railroads operating within its boundaries. The State intervened before the Interstate Commerce Commission in support of the application of the Minneapolis for authority, under Section 5(2) of the Interstate Commerce Act, to acquire control of the Western. Support of this application was determined to be necessary to the continued adequacy of railroad service in the State of Minnesota on the basis of the preservation of the present economic strength of the Minneapolis and the preservation of the Peoria Gateway. For the same reasons opposition to the competing application of the Pennsylvania-Santa Fe group was determined to be necessary.

The position of the State was arrived at after consultation with Dr. Edmund A. Nightingale, Professor of Economics and Transportation, School of Business Administration, of the University of Minnesota, and is based only upon the interests of the State of Minnesota and not the interest, as such, of the Minneapolis. The gist of the State's concern is that acquisition of the Western by Pennsylvania and Santa Fe will likely result in loss of considerable revenue to the Minneapolis, and the consequent impairment in the strength of the Minneapolis is detrimental to the interests of the State. The State's support of the Minneapolis application also considers the positive effects of consolidation of the Minneapolis and Western which undoubtedly

would give strength to the Minneapolis and would thereby be beneficial to the interests of the State.

## **THE QUESTIONS ARE SUBSTANTIAL**

The statement under this heading in the Minneapolis jurisdictional statement is incorporated herein by reference. Although the arguments therein make the most severe criticisms of the administrative and judicial processes so far involved in this proceeding, these criticisms are fully justified.

In addition, the State of Minnesota raises the following matters which are of special concern to it.

### **I.**

#### **The findings.**

The commission either failed to make findings or made conclusions entirely inconsistent with any findings on the following matters which were urged by the State of Minnesota.

- A. *The importance of the Minneapolis to the State of Minnesota, advantages to the State of Minnesota inherent in the granting of the Minneapolis application, and injuries to the State of Minnesota inherent in the denial of that application and the grant of the competing Pennsylvania-Santa Fe application.*

Since its low-water point in the 1930's, the Minneapolis has virtually been rebuilt and has steadily progressed to become a sound, good-service railroad. Its progress results from able management and its success in obtaining public acceptance of its freight service between the Twin Cities Gateway to the South, Southwest and East through the Peoria Gateway rather than through Chicago.

Dr. Nightingale's Exhibit, H-77, shows statistically the importance of the Minneapolis to the State of Minnesota. These data show, as may be expected, that the line renders extensive freight service, has large operating expenses, tax payments, capital investments and payroll. All of these contribute to the wealth and development of the state. Any curtailments of the line without some compensating advantage are bound adversely to affect the State of Minnesota.

If the Commission had granted the application of the Minneapolis, the railroad would have been greatly strengthened. Acquisition of the Western would give the Minneapolis direct access to interchanges with the numerous lines connecting with the Western. The Minneapolis would thereby secure both the advantage of longer hauls and also a greater competitive advantage by being enabled to render better service. The larger operation which would result from a combination of these two relatively small railroads would be conducive to many economies in management and general operations. Possibly of greatest benefit would be the resulting diversification of traffic which is so badly needed by the Minneapolis to relieve its current reliance on agricultural and mineral shipments.

On the other hand, a denial of the Minneapolis application and approval of the application of the Pennsylvania-Santa Fe combination would greatly damage and weaken the Minneapolis. This would occur primarily through the loss of Peoria-Nemo traffic handled by the Minneapolis in Illinois. The significance of this loss is so great that we feel it is appropriate to quote from the record on this point:

"M&StL freight revenue losses in the Peoria-Nemo Traffic and that through Peoria to or from other gateways in the event the application of the Pennsylvania-



Santa Fe combination were granted, have been estimated by witness James A. Swanson at approximately \$1,110,000 in his Exhibit H-32, Schedule 1, and testimony. His estimate of potentially vulnerable traffic revenue is \$7,000,000. Highly desirable traffic like that between Peoria and Nemo not only pays its way but gives substantial support to the entire M&StL system. It is highly doubtful that the grant of authority to acquire control of the TP&W to the Pennsylvania-Santa Fe group which would further reduce the already thin cushion which enables the M&StL to provide needed service on thin-traffic lines, is consistent with the National Transportation Policy and the requirements of Section 5(2) of the Interstate Commerce Act" (Tr. 1670-71).

The State of Minnesota is separately concerned with Minneapolis as an existing excellent transportation agency within the State, and Minneapolis' ability to transport goods through the Peoria gateway. Anything that would lessen Minneapolis' ability in either respect would be prejudicial to the State of Minnesota. Approval of the Pennsylvania-Santa Fe deal for Western would diminish the volume of traffic and revenues of Minneapolis, with repercussions on the secondary thin traffic lines of Minneapolis in Minnesota, which repercussions could take the form of curtailed accessorial facilities at the particular Minnesota communities, or even abandonment of trackage. The testimony of witnesses Nightingale and Swanson stands undisputed in these respects.

The Commission failed to give proper consideration to, and to make appropriate findings with respect to, these inevitable consequences of a grant of either of the competing applications. That failure constituted a violation of the requirements of the Administrative Procedure Act. It also led to a conclusion in flat disregard of the standards of



the National Transportation Policy and section 5(2) of the Interstate Commerce Act. The District Court did nothing to correct any of those errors. They can now be corrected and the Commission can be guided to a proper performance of its duty under the law only if the Supreme Court will give this appeal a full hearing on the merits.

*B. The importance of the Peoria Gateway to the State of Minnesota, advantages to the State of Minnesota inherent in the granting of the Minneapolis application and injuries to the State of Minnesota inherent in the denial of that application.*

At the hearing, Dr. Nightingale presented a comprehensive picture of the various gateways important to the State of Minnesota. The gateways mentioned were the Soo Gateway, the Chicago Gateway, the Peoria Gateway and the St. Louis Gateway. Because of the geographic situation of the State of Minnesota and the nature, origin and destination of its interstate commerce by railroad, Dr. Nightingale concluded that the Peoria Gateway, next to the Chicago Gateway, is the most important to the State of Minnesota. This importance stems from the necessity of connection with Official Territory railroads and connection with the Ohio River Gateways into Southern Territory and connection through St. Louis, Missouri or Thebes or Cairo, Illinois into Southwestern Territory. Moreover, three Western Trunk Line railroads, namely, the Minneapolis, the Rock Island lines and the Burlington lines, all serving the Twin Cities, have a direct connection to the Peoria Gateway. The Minneapolis line between the Twin Cities and the Peoria Gateway is the main line of that railroad. A further consideration of the importance of the Peoria Gateway to the

State of Minnesota is seen with regard to the aspects of national defense and the added importance that the Peoria Gateway would assume during any period of national emergency.

Economic circumstances indicate that control of the Western by the Pennsylvania-Santa-Fe combination would lead inescapably to stagnation of the Peoria Gateway because of the superior interest that these lines now have and would have in the St. Louis and Chicago Gateways. Any such lack of interest in the Peoria Gateway by a group in control of the Western, which railroad is so important to the future of the Peoria Gateway, would be highly detrimental to the interests of the State of Minnesota.

The interests of the Minneapolis in the Peoria Gateway, as already briefly mentioned, are altogether different from those of Pennsylvania-Santa Fe group. The Minneapolis is intimately and deeply concerned with the development of the Peoria Gateway. There is a long history of close relationship between the Peoria Gateway and the Minneapolis. Of all the lines coming into the Peoria Gateway, the Minneapolis alone gives this gateway national publicity. This advertising program is conducted for the very good reason that the Peoria Gateway is more than just the eastern terminus of the Minneapolis—it is the very genius of the enterprise. In view of the importance of the Peoria Gateway to the State of Minnesota, the state would feel more confident of its future development if the Western were placed in the hands of a railroad whose own economic well-being is tied in with the development of that gateway and its maintenance as an open gateway. That is to say, one that is not dominated by great railroad systems like the Pennsylvania and the Santa Fe whose primary and major interests lie elsewhere. Approval of Pennsylvania-Santa Fe deal

would dry up Peoria as a gateway in so far as the Minneapolis is concerned, resulting in the State of Minnesota, its industry and agriculture, being forced to rely more heavily on Chicago as their only large east and west rail gateway. The geographical location of Minnesota at the top tier of the United States and the natural barrier of the Great Lakes to the east, does not give Minnesota the choice of rail gateways, as contrasted to her sister states to the south. These factors, again, were ignored by the Commission in disregard of its statutory duty.

## II.

### **The failure to accord a comparative hearing.**

The Commission failed to conduct a true comparative hearing of the two competing applications as required by the law, all to the prejudice of the State of Minnesota as well as the Minneapolis.

In the hearing held under the provisions of the Interstate Commerce Act and the National Transportation Policy, it had always been the assumption of the State of Minnesota that since the Western was up for sale, that it would be sold to one or a combination of applicants after a hearing to determine which application was most in accordance with the public interest.

The Commission casts doubt upon Minneapolis' ability to consummate a "transaction" with the trustees and the minority stockholders of Western in the event the Commission would find for Minneapolis and against Pennsylvania-Santa Fe (Appendix B to Minneapolis jurisdictional statement, p. 92). The Commission's reasoning is that as Minneapolis has presently no enforceable contract for the purchase of Western stock (as does Pennsylvania-Santa Fe).

there would be no assurance the trustees would sell to Minneapolis if they were the only remaining prospective purchaser; and further that there would still remain a substantial minority of stock in the hands of other holders, which Minneapolis has no assurance it could acquire. As this question is primarily one for answer by Minneapolis, the State of Minnesota will leave it to it fully to cover the matter, with only one passing remark: the Commission in making its conclusion as above ignored the testimony of witness Patterson for Pennsylvania-Santa Fe and Exhibit H-76. From that evidence and exhibit it is clear the trustees would be willing to sell to Minneapolis (as they were on the verge of doing on May 26, 1955 before Santa Fe stepped in), and that the minority stockholders would have no reluctance to follow through on a sale to Minneapolis at the same price paid to trustees.

The effect of this approach of the Commission, questioning Minneapolis' ability to follow through on the "transaction", is a point which deserves scrutiny. The immediate effect is a dismissal of the Minneapolis application, which is the same as a denial of that application for all practical purposes. The dismissal operates as a denial in that the Commission then merely proceeds to compare the advantages in the public interest of the Pennsylvania-Santa Fe ownership versus ownership by the Pennsylvania-Santa Fe together with other railroads, or continuation of the present ownership of Western.

The test stated by the Commission as to the burden of proof in this proceeding is as follows:

"These proceedings represent a new and more complicated phase in the administration of section 5, since it involves 2 applications for authority to control the same property, and petitions by 4 other carriers for

inclusion in the transaction under varying circumstances. We must weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitioners seeking such inclusion but also the other applicant and non-participating railroads as well.

"The burden of proof, therefore, has become most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction. As a practical matter we, in such a proceeding as this, must arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it. The applications and petitions for inclusion must be denied unless there are advantages in the public interest." (Appendix B to Minneapolis jurisdictional statement, p. 65.)

We agree with this statement as to the burden of proof, but a full reading of the Division 4 report makes it clear that the Commission did not observe its own statement. What appears to have happened is that the application of the Pennsylvania and Santa Fe survived by a process of elimination over the other possible outcomes before the Commission. The decision that the Pennsylvania-Santa Fe ownership of Western would be better than the present ownership of Western was based simply upon the desirability of having the control of a carrier pass from non-carrier interests which no longer desire it to carrier interests. The Commission's report suggests that a comparison of the Minneapolis with the Pennsylvania-Santa Fe application was made on the merits. However, that was not the basis for the Commission's decision and it does not appear that it could have been.

In comparing the advantages of acquisition of the Western to Minneapolis or the Pennsylvania and Santa Fe, Dr. Nightingale stated:

"The effect of the grant of authority to acquire control of the TP&W to petitioners in Docket No. 18991 upon the net income of the Pennsylvania-Santa Fe combination, or either of them, would be minute. Actually, with operation of the TP&W as a separate property, the net income effect, assuming a 50 per cent net equity of Pennsylvania and Santa Fe in net income of TP&W, will be \$320,584. In the case of the Pennsylvania Railroad, this would amount to 1.1% of 1954 consolidated net income, or \$.02 per share of common stock; in the case of the Santa Fe this amount would produce 0.5% of 1954 consolidated net income, or \$.07 per share of common stock. By way of contrast, the estimated annual value of the TP&W to the M&StL is \$1,732,000 or 105.2% of 1954 net income of \$1,647,000 or \$2.17 per share of common stock (witness L. S. Provo, Exhibit H-44, Schedule 2).

"According to the Interstate Commerce Commission's Sixty-Eighth Annual Report on Transport Statistics in the United States for the Year ended December 31, 1954, total assets of the TP&W are \$9,893,197, those of the Pennsylvania Railroad are \$2,455,547,988, and those of the Santa Fe are \$1,484,889,559, and those of the M&StL are \$37,807,778. The TP&W assets in relation to the combined assets of almost \$4,000,000,000 for the Pennsylvania-Santa Fe combination are hardly visible at only 0.025% of this huge total. Viewed in broad perspective, the effect therefore of adding the 1954 net income and assets of the TP&W to those of the Pennsylvania-Santa Fe group is negligible, or about that of a peanut tossed by a child at a zoo to a hippopotamus" (Tr. 1669-70).

The test of public interest certainly includes consideration of the comparative advantages ensuing to the competing applicants themselves. Acquisition of the Western could not be for the Pennsylvania-Santa Fe group, as it would be for Minneapolis, a needed economic tonic. If, then, the Pennsylvania-Santa Fe proposed purchase amounts is only for the purpose of making a profitable investment, that is surely a poor justification for their proposal. It is possible that their intention is to monopolize the gateways of the midwest and alleviate the competition of the Peoria Gateway against their long-hauls to other gateways, although the avowed objective of these parties, as expressed in their contract with each other, was to keep the Western independent, free, open and neutral. The curious contradiction of acquiring control of the Western to assure its freedom and independence is, we suppose, possible, but the Pennsylvania-Santa Fe contract being "not for the benefit of others not parties thereto" (Appendix B to Minneapolis jurisdictional statement, p. 63) protects only the parties thereto against a change of mind, and the Commission's conditions for a neutral Western could be observed equally by Minneapolis.

In view of the fact that the Minneapolis application should not have been dismissed, but should have been considered on its merits and the further fact that Minneapolis consented to the conditions imposed by the Commission, which would keep the Western open and neutral in every respect, the relative advantages of the acquisition to the competing applicants looms as the most important consequence in the public interest involved in this proceeding. Yet, that is a consequence which the Commission virtually ignored. Its error can be corrected only by this court.



**III.****The scope of review by the district court.**

The opinion of the District Court merely mentions the appearances of the States of Minnesota and South Dakota and fails to deal specifically with any of their contentions. The three judge court convened to review this order of the Interstate Commerce Commission was an exceptional court, notwithstanding its unfortunate decision. It is impossible to attribute the failure of this court thoroughly to review the action of the Commission to any lack of ability or lack of industry on its part. It is plain that the court disagrees with the determination of the Interstate Commerce Commission. It is also plain that the court is unduly respectful to the Commission's errors. Where a court such as this is made to pay undeserved tribute to the Interstate Commerce Commission, as the facts and results of this case demonstrate, then a need for clarification of the powers of the courts with respect to review of administrative determinations is presented.

**CONCLUSION**

The Interstate Commerce Commission ignored both procedural requirements and the controlling substantive standards. The District Court failed to accord any meaningful review to the Commission's determination. It is submitted that the substantial questions of public importance presented by the several appeals in this action require full consideration on the merits.

Respectfully submitted,

MILES LORD

Attorney General of the State of Minnesota

HAROLD J. SODERBERG

Assistant Attorney General

102 State Capitol

Saint Paul, Minnesota